CAPTURED COURTS

The GOP's Big Money Assault On The Constitution, Our Independent Judiciary, And The Rule of Law

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OVERVIEW

At midnight on September 1, 2021, five Republican justices on the Supreme Court told millions of women living in Texas that they have no right to an abortion. The order came as abortion providers in Texas sought emergency relief from the Supreme Court, asking the justices to prevent Texas's newest abortion ban—S.B. 8—from going into effect. S.B. 8 bans abortions after six weeks of pregnancy—before most women know they are pregnant—and outsources enforcement of the law to private bounty hunters who are promised at least $10,000 if they successfully sue someone who provides an abortion or helps a woman get an abortion after six weeks.[1] This provision is designed to make it harder for providers to proactively challenge the law in court, while at the same time chilling any abortion care assistance whatsoever.

Faced with the decision of whether to respect its precedents or to allow this "flagrantly unconstitutional" law to go into effect, five Republican justices chose the latter.[2] Shortly before midnight the next day, these justices issued an unsigned order that did not even bother to mention the landmark precedents of *Roe v. Wade* or *Planned Parenthood v. Casey*.[3] Not even Chief Justice Roberts—himself no friend of reproductive rights—was willing to sign on to an order that so blatantly disregarded the rule of law.[4]

Women in Texas immediately felt the devastating consequences of the Court's decision. Overnight, abortion care was put out of reach for one in ten U.S. women of reproductive age.[5] Overwhelmed abortion clinics are scrambling to refer desperate patients out of state.[6] The average Texan of reproductive age now faces a drive of 247 miles, each way, to the closest out-of-state abortion clinic—a fourteen-fold increase.[7]

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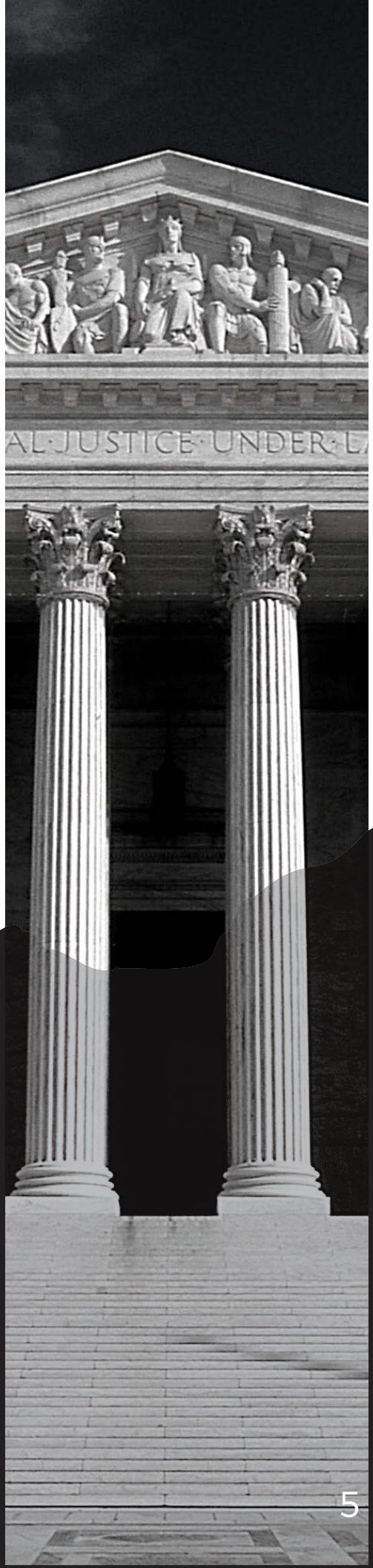
The Court's handling of S.B. 8 is just the latest example of a partisan Supreme Court stopping at nothing to impose its radical agenda on the American people. In October 2020, Senate Democrats warned that Republicans' reckless push to confirm the late Justice Ginsburg's replacement—no matter the cost—would endanger her legacy, along with "the rights and equal protection of millions of Americans for generations to come."[8] A short time later, our warning was proven correct. Republican donors' front groups spent tens of millions of dollars in dark money to get their hand-picked replacement to Justice Ginsburg, Amy Coney Barrett, confirmed.[9] Senate Republicans delivered, ramming through a nominee days before the 2020 presidential election in defiance of the precedent Mitch McConnell set with nominee Merrick Garland. Justice Barrett's confirmation cemented this Supreme Court as the Court that Dark Money Built.

Our earlier *Captured Courts* reports exposed the complex web of right-wing donors, front groups, and lawyers who propelled Donald Trump's justices onto the Court, and who orchestrate cases to deliver legal victories to those donors. Those reports also discussed the destructive consequences of the **over eighty** 5-4 partisan wins for wealthy special interests aligned with the Republican Party under Chief Justice John Roberts.[10]

This *Captured Courts* report examines how the October 2020 Supreme Court term continued to reshape American law to benefit these special interests. Throughout this term, the Court weaponized its "shadow docket" to change the law in the dead of night and issued opinion after opinion corroding protections to our democracy, undermining the rights of vulnerable groups, and favoring wealthy corporations over working-class Americans.



CAPTURED COURTS

The GOP's Big-Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law

The Trump Administration and Mitch McConnell's Senate Republicans had few significant legislative accomplishments. Instead, they packed the judiciary with far-right extremist judges. Mitch McConnell's Senate confirmed more than 200 new life-tenured federal judges and three Supreme Court justices, most of whom were chosen not for their qualifications or experience—which are often lacking—but for their allegiance to Republican political goals.

This court capture has been perpetrated through a complex network of anonymously-funded groups like the Federalist Society and spearheaded by right-wing activists like Leonard Leo. Their web consists of:

1. deep-pocketed, special-interest donors, who provide the money;

2. shell entities, which funnel the money and exploit tax laws to keep donors' identities secret;

3. public relations firms and political operatives who run multi-million-dollar ad campaigns to support and oppose judges and generate press to craft favorable public narratives; and

4. a brain trust of ideological think tanks, academic institutions, and "public interest" law firms, filled with lawyers and professors who generate "intellectual capital"—law review articles, *amicus* briefs, and so on—to advance the donors' interests through the courts.

Senate Democrats' new report exposes that web:

- ☑ How the "conservative legal movement" has rewritten federal law to favor the rich and powerful with more than 80 partisan Supreme Court decisions
- ☑ How the Federalist Society, Leonard Leo, and special-interest money dominate our courts
- ☑ How Mitch McConnell's broken Senate confirmation process helped Republicans and the big-money donors behind them

WHAT DOES GOP COURT-PACKING MEAN FOR AMERICA:

- Voters across the country wait in line for hours to vote
- Special interests flood our airways with political ads
- Workers have discrimination cases thrown out of court
- Communities can't regulate gun violence
- Polluters can pollute our air and water without consequence
- Access to healthcare, including abortion access, remains under attack

BY THE NUMBERS:

AT LEAST $250-400 MILLION in dark money is funding Republicans' court capture machine

86% of Donald Trump's nominees to the Supreme Court and influential appellate courts are Federalist Society members

FOR 50 YEARS right-wing donors and paid-for activists built a "conservative legal movement" to deliver for their agenda

MORE THAN 80 PARTISAN 5-4 DECISIONS at the Roberts Supreme Court have delivered wins to the Republican Party and the big corporate interests behind it

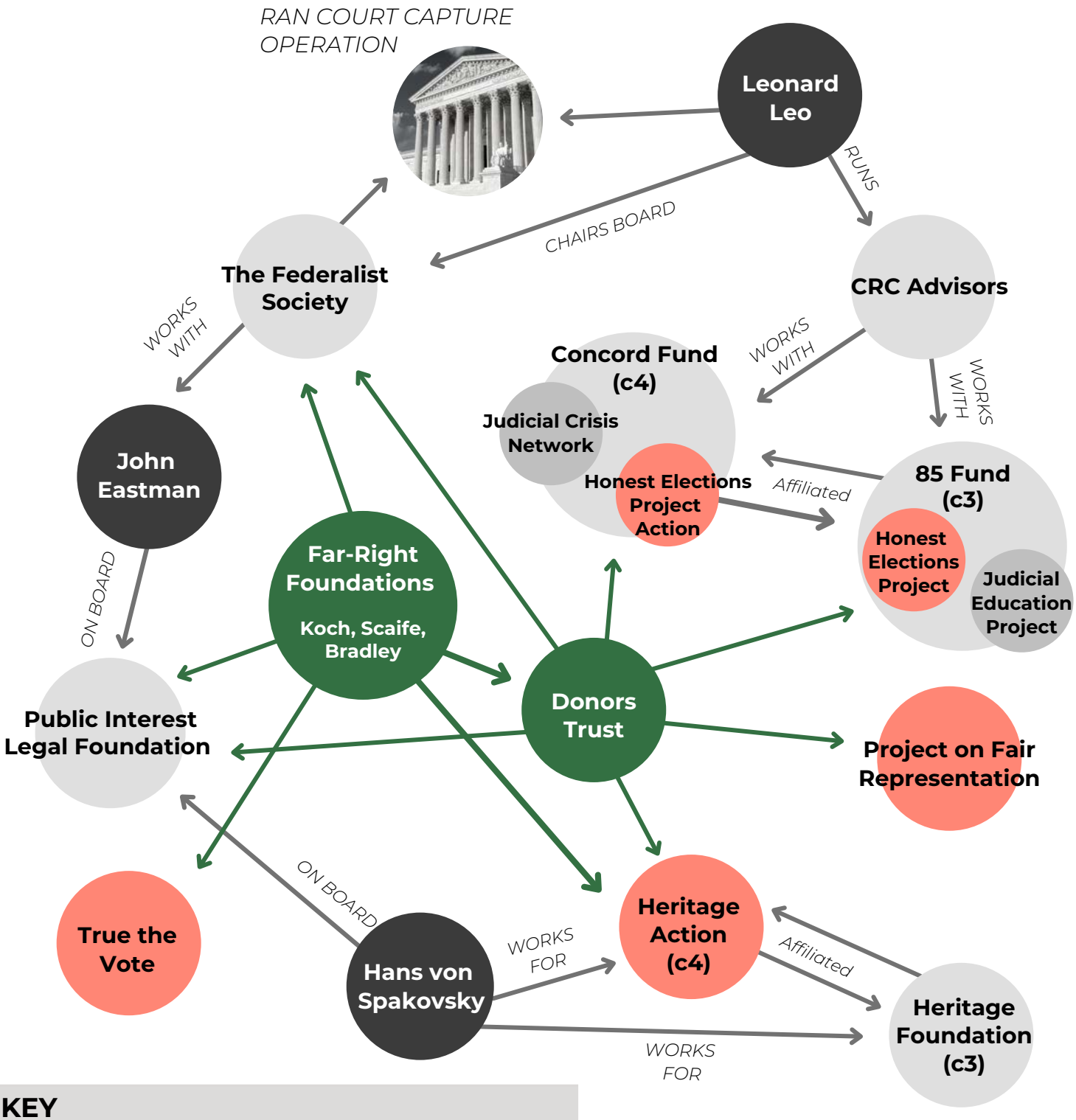
NEARLY 90% of the House-passed bills that Mitch McConnell sidelined to confirm partisan judges received bipartisan support

Assault on Democracy

As detailed in the Senate Democrats' *Captured Courts* report, the Republican Party and its wealthy donors have used the courts to rig our democracy and implement their unpopular agenda. Groups like the **Federalist Society** built a $400 million judicial-influence machine to select judges and then see those judges confirmed by Senate Republicans.[11] Political operators like the Federalist Society's **Leonard Leo** and wealthy individuals like **Edward Blum** use dark money to set up front groups like the **Project on Fair Representation** (PFR) to challenge voting rights in courts, as with the *Shelby County v. Holde*r case.[12]Other dark-money groups, including the **Honest Elections Project**, **True the Vote**, and **Heritage Action** took cues from Donald Trump and directly challenged the legitimacy of elections and voting rights.[13]Even after the election misinformation they spread led to a violent assault on the Capitol, these organizations continued to use "the Big Lie" to push through a wave of voter suppression laws in Republican state legislatures. Earlier this year, Heritage Action was caught on tape bragging about drafting many of these voter suppression laws.[14] Most of these groups have coordinated behind the scenes to challenge campaign-finance laws that help expose or fight back against their dark-money machine.[15]

COURT CAPTURE AND VOTER SUPPRESSION

How the Republican Party and its wealthy donors have used the courts to rig our democracy and implement their unpopular agenda



KEY

- Conservative Advocacy Groups
- Individuals
- Voter Suppression Groups
- Major Funders

This term, the Court that Dark Money Built showed that it remains a reliable partner in this assault on fundamental democratic principles. Throughout 2020, Republican justices used the shadow docket to invalidate new procedures intended to make voting safer during the Covid-19 pandemic (*RNC v. DNC*; *Merrill v. People First of Alabama*), and they bent over backwards to let Trump try to exclude immigrants from being counted in the decennial census used to allocate seats for Congress (*Trump v. New York*).

The justices' most aggressive attacks on our democracy, however, came in two other high-profile cases. In these cases, the Roberts Court's long-term strategy for judicial activism was at its clearest: the justices claim that their decisions are not radical because other democratic protections still exist, but then bide their time until they can strike those protections down, too.

What is the "Shadow Docket"?

The "shadow docket" refers to Supreme Court orders handed down outside of its typical "merits" docket. For cases on the merits docket, parties and *amici* have months to develop their arguments and defend them in lengthy briefs and oral arguments, after which the Court hands down extensively reasoned opinions explaining their decision. None of that applies on the shadow docket. For cases on the shadow docket, emergency orders are issued on limited timelines, with little time for briefs and without oral arguments. Shadow docket decisions are often unsigned, offer little to no explanation, and published in the dead of night. Historically, emergency requests made on the docket are intended to preserve the status quo while a case is working its way through the lower courts.

The Roberts Court has weaponized the shadow docket to speed up its agenda when it thinks the public is not looking.[16] By every metric, the Court's use of the shadow docket has increased dramatically over the past four years.

For example, over the past three years, the Court has averaged almost 17.67 shadow docket rulings that have stayed lower court rulings, lifted lower court stays, or issued injunctions; it averaged 5.7 from the October 2005 through the October 2014 terms.[17] And this term, the shadow docket more closely resembled the merits docket in the number of 6-3 and 5-4 partisan decisions.[18]

During the Trump Administration, the Court repeatedly used the shadow docket to overturn lower court injunctions against the administration and to speed up Trump's priorities. Now that President Biden is in office, however, the Republican justices have changed their approach, deploying the shadow docket to overturn the Biden administration's COVID-19 eviction moratoriums and allowing lower court judges to issue injunctions to override President Biden's policies. Most egregiously, the Republican justices have used the shadow docket to manipulate substantive constitutional law—either by inventing new constitutional protections for "religious liberty" in order to strike down COVID-19 public health measures, or by undermining reproductive rights by letting plainly unconstitutional abortion bans go into effect. Now, the justices are citing some of these unreasoned opinions as if they were merits cases and have instructed lower courts to do the same, sowing confusion among lower court judges.[19]

By using unsigned orders with no explanation to rewrite the law while the public sleeps, these justices have exposed just how unaccountable they think they are to the American people. As Justice Kagan wrote in her dissent to the Texas abortion order, the Court's shadow docket decision making "every day becomes more unreasoned, inconsistent, and impossible to defend."[20]

"The majority's decision is emblematic of too much of this court's shadow-docket decision making — which every day becomes more unreasoned, inconsistent and impossible to defend."

Justice Elena Kagan, dissenting in Whole Woman's Health v. Jackson

In *Americans for Prosperity Foundation v. Bonta*, the six Republican justices bolstered the dark-money machine that placed them on the Court. At issue in the case was a requirement that charities and nonprofits in California confidentially report information about their top donors to the state, information that these organizations must already report to the IRS. A dark-money not-for-profit at the center of the Koch family network, **Americans for Prosperity Foundation**, challenged that requirement alongside an armada of over 50 dark-money groups that filed amicus briefs.[21] While the case was pending, this group spent over $1 million on a "Full Scale Campaign to Confirm Judge Amy Coney Barrett."[22] Despite this obvious conflict, Justice Barrett refused to recuse herself from the case or even offer an explanation for that refusal.[23]

By striking down the California disclosure requirement at issue, the Court created an entirely new constitutional right to dark-money political spending

The Supreme Court's past campaign-finance rulings like *Citizens United* were predicated on the argument that disclosure requirements would be enough to prevent the corrupting influence of money in politics.[24] *Americans for Prosperity* brought the Court a step closer to invalidating this protection. By striking down the California disclosure requirement at issue, the Court created an entirely new constitutional right to dark-money political spending—a decision, as Justice Sotomayor wrote, that "[n]either precedent nor common sense supports."[25] This new right allows wealthy donors to use their hyper-political nonprofits to exercise secret influence on our democracy from the shadows and signals the justices' willingness to deliver even more for their dark-money backers in the future. Notably absent from Chief Justice Roberts's radical majority opinion was any "textualist" or "originalist" legal analysis—the so-called "conservative" principles proudly trumpeted by Justices Barrett, Kavanaugh, and Gorsuch and their Republican supporters at their nomination hearings.[26] That's because the Framers never contemplated any right to anonymous political spending and certainly didn't put one in the text of the Constitution. As Senate Democrats have documented, the Court's Republicans regularly discard these doctrines when they stand in the way of political outcomes demanded by the Republican donor class.[27]

Not content with expanding the avenues for wealthy interests to undermine democracy in secret, the Republican justices also made it easier for Republican legislatures to openly restrict voting rights for people of color. A decade ago, the Court gutted Section 5 of the Voting Rights Act in *Shelby County v. Holder*. A key holding of *Shelby County* was that Section 2 would still provide adequate protections if Section 5 was not enforced. In *Brnovich v. DNC*, the justices neutralized Section 2 of the VRA by creating an almost-impossible-to-meet standard for proving that a law is racially discriminatory.

By further undermining the federal government's attempts to protect voters from racial discrimination, the GOP-appointed justices made it even easier for Republican-controlled states to make up non-discriminatory excuses for clearly discriminatory voting restrictions. In fact, the Republican official defending the voter suppression law in *Brnovich* admitted to Justice Barrett that their only interest in the case was to prevent being put "at a competitive disadvantage relative to Democrats."[28]Now, when Republican legislatures enact laws that make it disproportionately harder for people of color to vote—including laws that make it harder to register to vote, reduce polling hours and locations, and make it more likely that ballots get discarded on technical errors—those legislatures can defend the law in court by pointing to unjustified fears about non-existent voter fraud.

Justice Barrett:
What's the interest of the Arizona RNC in keeping, say, the out-of-precinct **ballot disqualification** rules on the books?

Attorney Michael Carvin:
Because it puts us at a **competitive disadvantage relative to Democrats**, Politics is a zero-sum game.

Just as in *AFPF*, the Court's Republican majority opinion trampled over any notion of textual fidelity. As the *Washington Post's* Ruth Marcus put it recently, "Justice Samuel A. Alito Jr., joined by all of his supposedly conservative colleagues, not only ignored the clear text of Section 2 but invented entirely new parts — what Justice Elena Kagan, for the liberal dissenters, called 'a list of mostly made-up factors, at odds with Section 2 itself.'"[29]Ms. Marcus is correct: "This is activism, not conservatism."[30]The Court's decision to endorse these obvious partisan tactics weakens our democracy by sacrificing the ability of all voters—especially voters of color—to vote and weakening the integrity of campaign-finance laws intended to protect our democracy from corrupt dark money.

Undermining Civil Rights

In *Captured Courts*, Senate Democrats explained how the Supreme Court has used partisan decisions and raw power to increasingly implement its own agenda and dismantle constitutional protections for vulnerable groups, including women and immigrants. This trend continued in the October 2020 term, with the Republican justices handing victories to the radical interests that placed them on the Court in order to erase a woman's right to choose, reject humane immigration policies, and impose upon the American people the preferences of wealthy, conservative Christian groups under the guise of "religious liberty."

Reproductive Rights

For decades, far-right groups have dedicated millions of dollars toward overturning *Roe v. Wade* and *Planned Parenthood v. Casey*.[31] Koch-connected and dark-money groups like **Concerned Women for America** (CWA), **Americans United for Life** (AUL), and the J**udicial Crisis Network** (JCN) drafted anti-abortion legislation for state legislatures, opposed exceptions for rape and incest in abortion restrictions, and funded ad campaigns to support confirming right-wing judges and justices.[32] These groups knew, based on Barrett's history of animosity toward *Roe*,[33] that Barrett's confirmation would solidify this Court as one that would advance their anti-abortion crusade. The Judicial Crisis Network bragged about spending over $10 million supporting Barrett's confirmation,[34] and Concerned Women for America launched a twelve-state bus tour to pressure senators into confirming the "conservative, constitutionalist, pro-life" Barrett.[35]

After stacking the federal judiciary, anti-abortion groups finally have built a receptive audience for their agenda. In January, these justices used the shadow docket to overrule a lower court judge who found that patients could immediately receive abortion medication by mail instead of having to see doctors in person during the COVID-19 pandemic (FDA v. American College of Obstetricians and Gynecologists). By reimposing these requirements, the Court significantly limited women's access to safe abortion medication.[36]

Emboldened by the new Supreme Court majority, anti-abortion activists made the most of it by crafting their most invidious anti-choice law yet. S.B. 8 was concocted by former Justice Antonin Scalia clerk and Federalist Society lawyer Jonathan Mitchell.[37] As Justice Sotomayor noted, this law is "flagrantly unconstitutional" under existing Court precedents,[38] but activist anti-abortion judges on the 5th Circuit Court of Appeals and five Republican justices on the Supreme Court allowed the law to go into effect nonetheless (*Whole Woman's Health v. Jackson*).

Texas's S.B. 8
Outsources enforcement of the law to private parties by offering $10,000 bounties for a successful suit against anyone who helps a person seek an abortion in defiance of the law.

Jonathan F. Mitchell

The Court may not have officially overturned *Roe* and *Casey* yet, but for women in Texas, that's a distinction without a difference. Access to abortions—already limited before S.B. 8—has become exceptionally restricted. Around 85% of abortions that were performed in Texas are now illegal.[39] Intimidated by the profound "chilling effect" of S.B. 8, some clinics no longer provide abortions at all,[40] and the remaining clinics can't keep up with demand are are forced to make referrals to out-of-state clinics.[41]

Given the additional costs associated with traveling out of state for care—including hotel stays, transportation, childcare, and lost wages, among others—this abortion ban will mean that many will not be able to access care at all. Worse still, Republican legislative officials in at least eleven states have already said that they may copy S.B. 8, and more could soon follow.[42]

Immigration

The Court also handed down partisan wins for far-right extremists and private prison corporations who profit from immigrant detention centers. First, the Court read the Immigration and Nationality Act to deprive certain detained immigrants of the opportunity to secure their release on bond (*Johnson v. Guzman Chavez*). Then, the Court's Republicans used the shadow docket to suddenly reverse its long-standing deference to presidential immigration and foreign policy, instead allowing a single lower court judge to force the Biden Administration to reinstate Trump's disastrous "Remain in Mexico" policy (*Biden v. Texas*).

Profiting from Immigrant Detention

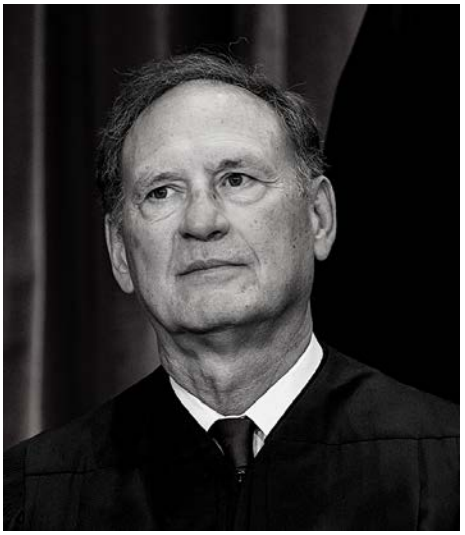
Private prison firms like ***CoreCIVIC*** *and The* ***Geo Group*** *saw business boom during the Trump Administration. They may no longer have backing from the White House or Congress, but they know they can still rely on the GOP-appointed Justices on the Supreme Court.*

These decisions don't just continue the Republican majority's pattern of hostility toward immigrants and reward the fringe anti-immigrant groups that support the GOP. They also bolster the bottom line of private detention corporations like The Geo Group and CoreCivic. Roughly 80% of those in ICE custody are held in facilities either owned or managed by companies like CoreCivic and The Geo Group, and 28% of these companies' revenue in 2020 came from ICE contracts to house detained immigrants.[43] These for-profit private prison firms saw their businesses boom under the Trump Administration's inhumane immigration policies, and they have donated vast sums of money to the GOP Members of Congress who supported those policies.[44] These companies may no longer have backing from the White House or Congress, but they know they can still rely on the GOP-appointed justices on the Supreme Court.

Religious Liberty

At the same time that the Court rolled back protections for women and immigrants, it ramped up its selective expansion of religious liberty. Captured Courts explained how the Court's religious liberty decisions have created more rights for corporations, been inconsistently applied across faith groups, and come at the expense of women and members of the LGBTQ community.[45] Most of these cases have been pushed by conservative groups and Federalist Society lawyers with the same dark-money ties to organizations like the **Becket Fund for Religious Liberty**, the **Bradley Foundation**, the **Koch Family Foundation**, and the **Judicial Crisis Network**.[46]

Despite a raging pandemic that claimed more than 700,000 American lives, the court bulldozed COVID-19 safety protections to push an agenda of religious liberty



Justice Alito delivered a partisan speech at the Federalist Society's national convention to openly question the authority of many public health orders issued in response to COVID-19.

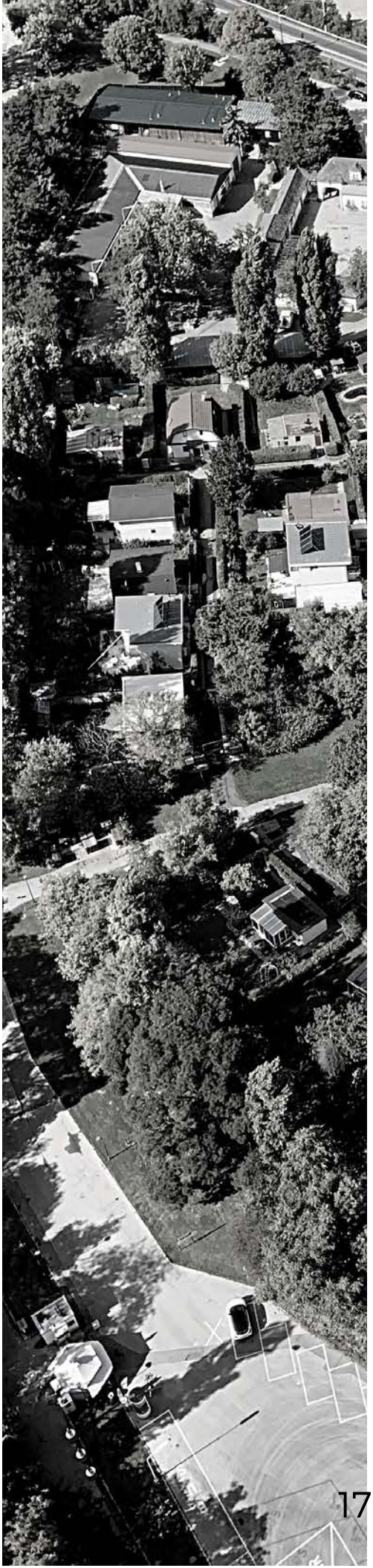
These groups scored more victories this term as the Republican-appointed justices repeatedly used the cudgel of religious rights to misconstrue facts and invalidate public health orders intended to protect communities by preventing the spread of COVID-19 (*Roman Catholic Diocese of Brooklyn v. Cuomo*, *Tandon v. Newsom*, *High Plains Harvest Church v. Polis*). Most of this was accomplished via the Court's shadow docket, which was used to fundamentally alter the Court's longstanding precedents on the treatment of religious groups in generally applicable laws—seemingly adopting a "most favored nation" status for religion. These cases largely ignored the longstanding case law supporting governments' broad power to confront public health crises.[47] Abandoning all pretense, Justice Alito, delivering an undeniably partisan speech at the Federalist Society's national convention, used the lens of religious liberty to openly question the authority of many public health orders issued in response to COVID-19.[48] The Republican justices' antipathy toward precedent and their willingness to put religious interests above all others should concern anyone who believes in this country's principle of the separation of church and state.[49]

Boosting Corporate Interests and Undercutting Labor Rights

Just as these justices sacrificed the constitutional rights of vulnerable groups in exchange for wealthy and far-right interests, the justices also undermined workers' rights in order to boost corporate interests. In some of these cases, the Court again weaponized the shadow docket to rule in favor of corporate GOP donors.

8 *the total number of pages the Republican Justices spent explaining why they were subjecting millions of people to eviction*

Without full argument or briefings, the Republican justices struck down two eviction moratoria (*Alabama Association of Realtors; Chrysafis v. Marks*) intended to protect renters from being evicted in the middle of a deadly pandemic. At the same time, the Justices continued to allow wealthy, corporate interests to escape accountability. In *TransUnion LLC v. Ramirez*, the Court said that a credit reporting agency mistakenly connecting thousands of people to terrorists and drug traffickers is not a "concrete harm" allowing them to sue for money damages. Instead, these people had to wait until these mistaken credit reports were released, potentially denying them access to loans on cars and homes and seriously damaging their financial reputations. Not only does this opinion ignore Congress's decision to grant these people the right to sue, it is also divorced from the reality of just how disastrous a single poor credit report can be for the average American. The case also sets the stage for the justices to deny future working-class Americans access to the courts until wealthy corporations have irreparably upended their lives.



The justices also boosted the GOP's corporate donors by continuing the Roberts Court's hostility for labor unions and workers' rights. In *Cedar Point Nursery v. Hassid*, the Court invented a property right that entitles private landowners to compensation whenever the government requires them to allow officials to enter their land. The landowner in *Cedar Point* was just the latest plaintiff of convenience represented by the **Pacific Legal Foundation**—one of many right-wing legal advocacy groups that repeatedly serve as dark-money legal advocates for fossil fuel companies and other corporate interests.[50] *Cedar Point* could prove to be a massive boon for more than just union-busting GOP backers like the **State Policy Network**, the **Bradley Foundation**, and other groups anonymously funded by the Koch-backed **DonorsTrust** and **Donors Capital Fund**, groups that have dedicated millions towards litigating and fighting against workers' right to organize.[51] The decision also threatens the ability of governments to enforce fair housing and anti-discrimination laws or to complete health and safety inspections—all of which might require property holders to be paid for each visit onto their property. In the words of the Pacific Legal Foundation itself, *Cedar Point* "add[s] remarkable firepower to the legal arsenal" of front groups like PLF that defend wealthy special interests.[52]

Diminishing the Power of Government

In *Cedar Point Nursery v. Hassid*, the Court invented a property right that entitles private landowners to compensation whenever the government requires them to allow officials to enter onto their land.

The decision threatens the ability of governments to

- permit labor organizers to access workers
- enforce fair housing and anti-discrimination laws
- complete health and safety inspections

What to Expect Next

The Supreme Court's October 2020 term delivered massive wins for the dark-money special interests that fund the Republican Party, but The Court that Dark Money Built will not stop there. Right-wing legal foundations, Republican legislatures, and Federalist Society lawyers have teed up more cases for the Court. The October 2021 term looks to be just as devastating.

The justices have a chance to further advance their cause of "religious liberty" at the expense of broader public interests in *Carson v. Makin*. In this case, dark-money "public interest" law firms like the **Institute for Justice** and the **American Center for Law and Justice**—run by former Trump attorney Jay Sekulow—are pushing the Court to force public schools to allow state-funded school vouchers to be used to pay for private religious schools.[53] If the Republican justices agree, it would be yet another blow to the separation between church and state, especially governments' ability to not use taxpayer money to fund religious teachings. In two other cases (*Johnson v. Arteaga-Martinez*; *Garland v. Gonzalez*), the Court may restrict opportunities for detained immigrants to request hearings and potentially be released on bond. And in *CVS Pharmacy v. Doe*, the justices could roll back disability-based claims alleging harmful and discriminatory effects and limit patients' rights in suits against large pharmaceutical companies.

In addition to these cases, the Republican justices could finally overturn *Roe* and *Casey* in *Dobbs v. Jackson Women's* Health, a case involving a Mississippi law banning abortions after 15 weeks of pregnancy. The law was drafted by a group that is a member of **State Policy Network** and that has received significant funding from **Donors Capital Fund,** the "dark-money ATM of the conservative movement."[54] The Justices may also kill affirmative action in higher education (*Students for Fair Admission v. Harvard*). **Students for Fair Admissions** is the latest front group run by Edward Blum and propped up by the Federalist Society funding network.[55] Finally, the relentless dark-money gun lobby has set the Court up to once again gut gun safety regulations by expanding the scope of the Second Amendment (*New York State Rifle & Pistol Association v. Corlett*), potentially endangering numerous commonsense federal, state, and local regulations on firearms in public.

Senate Democrats' *Captured Courts* reports extensively detailed the successful efforts by wealthy special interests to enlist the Republican Party in their mission to capture our federal judiciary and implement their own agenda using coordinated dark-money tactics. Amy Coney Barrett's confirmation was just the latest success for these dark-money actors, and all signs point toward the Court continuing its assault on our Constitution and the American people going forward.

What We Can Do

Congress and President Biden should act now to repair the damage done by this Court and to prevent it from continuing to trample on our most basic values. Congress should start by passing the Freedom to Vote Act and John Lewis Voting Rights Advancement Act. These bills would reinvigorate our democracy by restoring the Voting Rights Act's protections for voters of color and protecting our elections from voter suppression, election subversion, and unfair gerrymandering. Congress should also pass measures, such as the DISCLOSE Act and Judicial Ads Act, to combat the billions of dollars in dark money unleashed by this Court's decisions. The DISCLOSE Act would permit Americans to see who is really spending to influence our elections by bolstering our campaign finance laws' transparency and disclosure requirements. The Judicial Ads Act would do the same for those whose dark money funds the $400 million takeover of our federal courts.

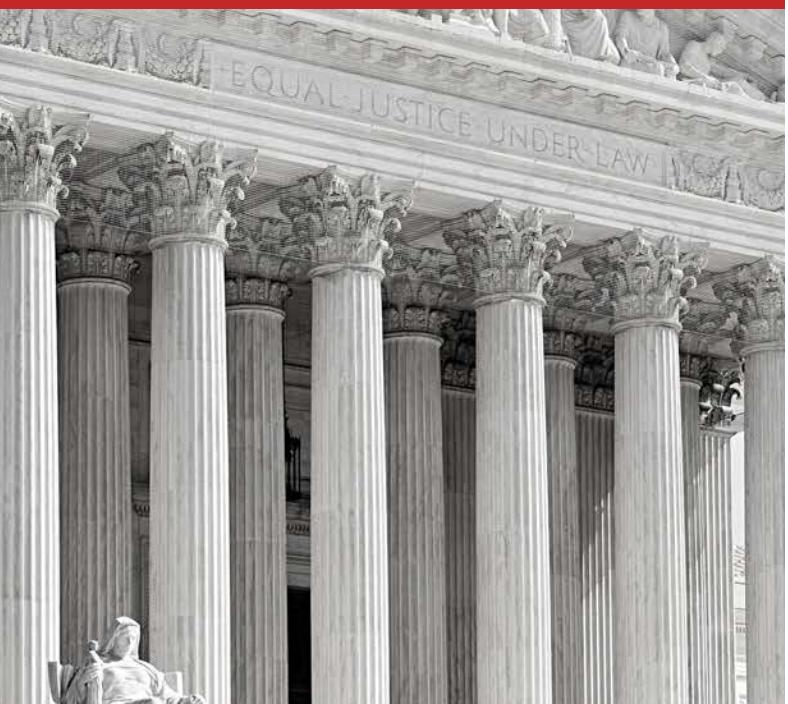
Congress should not wait for the Supreme Court to thwart abortion access any further. It should act now to protect abortion access, including by passing the Women's Health Protection Act of 2021. This bill would establish a statutory right for health care professionals to provide abortion care and the right for their patients to receive care, free from bans and medically unnecessary restrictions that single out abortion care.

The Women's Health Protection Act	Establishes a **statutory right** for health care professionals to **provide abortion care** and the right for their patients to **receive care**
Freedom to Vote Act & John Lewis Voting Rights Act	Restores the Voting Rights Act's **protections for voters of color** and protects our elections from voter **suppression**, election **subversion**, and unfair **gerrymandering**
DISCLOSE Act & Judicial Ads Act	Strengthens **transparency and disclosure requirements** for both campaign finance and judicial nominations

To prevent justices from ruling in cases involving the same dark money groups who spent millions of dollars to place those justices on the Court, Congress should require the Supreme Court to finally adopt the same sorts of ethics rules that all other judges must abide by. And Congress should work with the judiciary to ensure that its ethical requirements become robust and effective.

Many of the problems identified in this and other *Captured Courts* reports will require deeper consideration of how wealthy special interests have been able to successfully undermine our Constitution's promise of an independent judiciary—and what steps we can take to restore the integrity of our judiciary and our democracy. President Biden has already convened a commission of legal experts who are well-positioned to consider some of these issues and to propose innovative solutions for Congress and President Biden to enact. But the Commission has not yet given these issues the attention they deserve, despite the insurmountable evidence of these problems as exposed in the Senate Democrats' *Captured Courts* series. We hope the Commission will make the most of its remaining time, and the Commissioners will dedicate themselves to analyzing these grave threats.

Court capture succeeded because we were not prepared for the scope and relentlessness of the dark money machine, and its effects on our country and our values have been devastating.



Even if the Commission fails to live up to this challenge, Congress, President Biden, and the American people must not. Court capture succeeded because we were not prepared for the scope and relentlessness of the dark-money machine. Consequently, its effects on our country and our values have been devastating. If we want to resist these special interests, the time for action must be now. Protecting our Constitution, our democracy, our people, and our environment from this assault will require clear-eyed thinking about the broad threat the dark-money machine and its Court pose, bold solutions for responding to this threat, and decisive actions to implement those solutions. We can rise to meet this obligation, but we cannot wait until irreparable damage is done.

ENDNOTES

1. Shannon Najmabadi, Gov. Greg Abbot signs into law one of nation's strictest abortion measures, banning procedure as early as six weeks into a pregnancy, Tex. Trib. (May 19, 2021), https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/; S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).
2. Whole Woman's Health v. Jackson, 594 U.S. ___ (2021) (Sotomayor, J., dissenting).
3. Id. at 1 (majority opinion).
4. Id. (Roberts, C.J., dissenting).
5. Nash et al., Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion, Guttmacher Institute (Sept. 15, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion
6. Melissa Jeltsen, Texas Is Already Creating Abortion Refugees, Intelligencer (Sept. 3, 2021), https://nymag.com/intelligencer/2021/09/texas-is-already-creating-abortion-refugees.html#_ga=2.29730879.18462384.1631016616-557791480.1621289186.
7. Id.
8. DPCC Senate Democrats, What's At Stake: Equal Justice Under Law 2 (October 2020) [hereinafter Equal Justice], available at https://www.democrats.senate.gov/imo/media/doc/DPCC%20Captured%20courts%20Democracy%20Report.pdf.
9. Jordan Fabian, Trump-Allied Groups Pour $30 Million Into Barrett Confirmation, Bloomberg (Oct. 22, 2020), https://www.bloomberg.com/news/articles/2020-10-22/trump-allied-groups-pour-30-million-into-barrett-confirmation.
10. DPCC Senate Democrats, Captured Courts 5 (May 2020) [hereinafter Captured Courts Report] available at https://www.hsdl.org/?view&did=839500.
11. DPCC Senate Democrats, What's At Stake: Democracy 10 (October 2020) [hereinafter Democracy], available at https://www.democrats.senate.gov/imo/media/doc/Captured%20Courts%20Democracy%20Report.pdf; What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary: Hearing Before the S. Comm. on the Judiciary, 117th Cong. 6 (2021) (testimony of Lisa Graves, President, Center for Media & Democracy), available at https://www.judiciary.senate.gov/imo/media/doc/Final_CMD_Lisa%20Graves_Written%20Testimony%20for%20March%2010%202021%20Subcommittee%20Hearing1.pdf.
12. Equal Justice, supra note 8, at 13-15.
13. See Bill Barrow, GOP activist's voter challenges raise questions in Georgia, AP News (Dec. 22, 2020), https://apnews.com/article/georgia-elections-political-organizations-voter-registration-atlanta-3a8989df44c323ce798e0a5d34eb9876; Ari Berman & Nick Surgey, Leaked Video: Dark Money Group Brags About Writing GOP Voter Suppression Bills Across the Country, Mother Jones (May 13, 2021), https://www.motherjones.com/politics/2021/05/heritage-foundation-dark-money-voter-suppression-laws/; Sam Levine & Anna Massoglia, Revealed: conservative group fighting to restrict voting tied to powerful dark money network, The Guardian (May 27, 2020), https://www.theguardian.com/us-news/2020/may/27/honest-elections-project-conservative-voting-restrictions; Nicholas Riccardi, Conservative group pushes proposals to tighten voting laws, AP News (Mar. 2, 2021), https://apnews.com/article/donald-trump-voting-voting-rights-elections-us-news-6ad139a7299bbc524fbcc9d2233ea1b2.
14. Barrow, supra note 13.
15. Democracy, supra note 11, at 5.
16. The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 117th Cong. 4-8 (2021) (statement of Stephen Vladeck, Charles Alan Wright Chair in Federal Courts, Univ. of Tex. School of Law).
17. Steve Vladeck (@steve_vladeck), Twitter (Sept. 7, 2021, 12:49 PM), https://twitter.com/steve_vladeck/status/1435284127041863687.
18. Steve Vladeck (@steve_vladeck), Twitter (Sept. 3, 2021, 11:57 PM), https://twitter.com/steve_vladeck/status/1434002701881380864/photo/1.
19. Statement of Steve Vladeck, supra note 16, at 7-8.

ENDNOTES

20. Whole Woman's Health v. Jackson, 594 U.S. ___ (2021) (Kagan, J., dissenting).
21. See Brief for Sen. Whitehouse et al. as Amici Curiae Supporting Respondents at 14 n.29, 23, Americans for Prosperity Foundation v. Bonta, 594 U.S. ___ (2021) (No. 19-251).
22. Alex Gangitano, Barrett ad war exceeds Kavanaugh fight, The Hill (September 30, 2020), https://thehill.com/business-a-lobbying/business-a-lobbying/518850-advocacy-groups-spend-big-on-barrett-fight.
23. Jon Skolnik, Amy Coney Barrett refuses to recuse herself from dark money case of Koch-funded group, Salon (Apr. 27, 2021), https://www.salon.com/2021/04/27/amy-coney-barrett-refuses-to-recuse-herself-from-dark-money-case-of-koch-funded-group/.
24. See Democracy, supra note 11, at 3-5.
25. Americans for Prosperity v. Bonta, 594 U.S. ___ (2021) (Sotomayor, J., dissenting).
26. Confirmation Hearing on the Nomination of Hon. Neil Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 130-31, 161-64, 180, 242-43, 262, 307-308, 319-20, 339-41 (Statements of Sen. Cornyn, Sen. Cruz, Sen. Sasse, Sen. Kennedy, Sen. Graham, Sen. Crapo, & Neil Gorsuch, Judge, 10th Cir.), available at https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf (describing originalism and textualism and stating that Judge Gorsuch is an originalist and textualist); Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 194-196, 296 (2018) (statements of Sen. Mike Lee, Sen. John Kennedy, & Judge Brett Kavanaugh, Judge, D.C. Cir.), available at https://www.govinfo.gov/content/pkg/CHRG-115shrg32765/pdf/CHRG-115shrg32765.pdf (describing originalism and textualism and stating that Judge Kavanaugh is an originalist and textualist); S. Comm. on the Judiciary, U.S. Congress, Senate Judiciary Committee Holds Hearing on the Nomination of Amy Coney Barrett to be an Associate Justice on the Supreme Court of the United States, Day 2 (2020), https://plus.cq.com/doc/congressionaltranscripts-6030117?1 (statements of Sen. Lindsey Graham, Chair, Sen. Lee, Sen. Sasse, Sen. Ernst, Sen. Crapo, Sen. Kennedy, & Amy Coney Barrett, Judge, 7th Cir.) (describing originalism and textualism and stating that Judge Barrett is an originalist and textualist).
27. Captured Courts, supra note 10, at 15.
28. Abigail Weinberg, A GOP Lawyer Says the Quiet Part Out Loud in SCOTUS Voting Rights Case, Mother Jones (Mar. 2, 2021), https://www.motherjones.com/mojo-wire/2021/03/gop-lawyer-says-the-quiet-part-out-loud-in-scotus-voting-rights-case/.
29. Ruth Marcus, Opinion, The Supreme Court doesn't just suffer from political hackery. It's more insidious than that, Wash. Post (Sept. 14, 2021), https://www.washingtonpost.com/opinions/2021/09/14/amy-coney-barrett-is-wrong-hackery-isnt-political-its-judicial/.
30. Id.
31. See DPCC Senate Democrats, What's At Stake: Health Care and Reproductive Rights (Sept. 2020) [hereinafter Reproductive Rights], available at https://www.democrats.senate.gov/imo/media/doc/FINAL%20DPCC%20Captured%20Courts%20Health%20Care%20and%20Reproductive%20Rights%20Report.pdf.
32. See id.
33. Kate Smith, Four things we've learned about how Amy Coney Barrett might view abortion cases, CBS News (Oct. 16, 2020), https://www.cbsnews.com/news/amy-coney-barrett-confirmation-hearings-abortion-roe-v-wade/ (noting Barrett's admission to signing an ad saying calling Roe "barbaric" and "defend[ing] the right to life from fertilization to natural death).
34. Judicial Crisis Network, Judge Amy Coney Barrett Confirmed (Oct. 27, 2020), https://judicialnetwork.com/in-the-news/judge-amy-coney-barrett-confirmed/.
35. Stephanie Rivera, Historic Moment for Conservative Women, ACB Confirmed to the Supreme Court, Concerned Women for Am. (Oct. 26, 2020), https://concernedwomen.org/historic-moment-for-conservative-women-acb-confirmed-to-the-supreme-court/.

ENDNOTES

36. Carrie Baker, Advocates Cheer FDA Review of Abortion Pill Restrictions, Ms. Magazine (May 11, 2021), https://msmagazine.com/2021/05/11/fda-review-abortion-pill-restrictions-mifepristone-biden/.
37. Michael Schmidt, The Conservative Lawyer Behind the Texas Abortion Law, N.Y. Times (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html?smtyp=cur&smid=tw-nytimes.
38. Whole Woman's Health v. Jackson, 594 U.S. ___ (2021) (Sotomayor, J., dissenting).
39. Reese Oxner, Texas lawmakers' novel approach to skirting Roe v. Wade leaves abortion rights advocates without a legal playbook, Texas Tribune (Sept. 10, 2021), https://www.texastribune.org/2021/09/10/texas-abortion-ban-legal-challenges/.
40. Id.
41. Jeltsen, surpa note 6.
42. Meryl Kornfield et al., Texas created a blueprint for abortion restrictions. Republican-controlled states may follow suit, Wash. Post (Sept. 3, 2021), https://www.washingtonpost.com/nation/2021/09/03/texas-abortion-ban-states/.
43. Lauren-Brooke Eisen, Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts, Brookings Inst. (Aug. 27, 2021), https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts.
44. Nomaan Merchant, Private prison industry backs Trump, prepares if Biden wins, Wash. Post (Aug. 13, 2020), https://www.washingtonpost.com/health/private-prison-industry-backs-trump-prepares-if-biden-wins/2020/08/13/a51c8f64-dd8a-11ea-b4f1-25b762cdbbf4_story.html.
45. See Equal Justice, supra note 8, at 10-12.
46. Id. at 13-15.
47. See ABA, Two Centuries of law guide legal approach to modern pandemic (Apr. 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/; Stephanie Wylie, The Supreme Court Should Not Politicize Valid Public Health Orders, Ctr. Am. Progress (Sept. 2, 2020), https://www.americanprogress.org/issues/courts/reports/2020/09/02/489964/supreme-court-not-politicize-valid-public-health-orders/.
48. Josh Blackman, Video and Transcript of Justice Alito's Keynote Address to the Federalist Society, Reason (Nov. 12, 2020), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/.
49. See Vikram David Amar & Alan Brownstein, Exploring the Meaning of and Problems With the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty Under the Free Exercise Clause: Part One in a Series, Verdict (Apr. 30, 2021), https://verdict.justia.com/2021/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c; Vikram David Amar & Alan Brownstein, "Most Favored-Nation" ("MFN") Style Reasoning in Free Exercise Viewed Through the Lens of Constitutional Equality:, Verdict (May 21, 2021), https://verdict.justia.com/2021/05/21/most-favored-nation-mfn-style-reasoning-in-free-exercise-viewed-through-the-lens-of-constitutional-equality; Tyler Broker, This Supreme Court's Religious Liberty Approach Would Be Silly, If the Consequences Were Not So Dire, Above the L. (Feb. 8, 2021), https://abovethelaw.com/2021/02/this-supreme-courts-religious-liberty-approach-would-be-silly-if-the-consequences-were-not-so-dire/.
50. See Brief for Sen. Whitehouse et al. as Amici Curiae Supporting Respondents at 18-19, Cedar Point Nursery v. Hassid, 594 U.S. ___ (2021) (No. 20-107); see also DPCC Senate Democrats, What's at Stake: Labor and Workers' Rights (Oct. 2020) [hereinafter Workers' Rights], https://www.democrats.senate.gov/imo/media/doc/DPCC%20Captured%20Courts%20Labor%20and%20Workers'%20Rights%20Report.pdf.
51. See Mary Bottari, Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions, In These Times (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.
52. Pacific Legal Foundation, The Future of Regulatory Takings at the Supreme Court, https://pacificlegal.org/events/the-future-of-regulatory-takings-at-the-supreme-court/ (last accessed Sept 16, 2021).

ENDNOTES

53. Editorial Staff, The Institute for Justice's Michael Bindas on the SCOTUS, Carson v. Makin, & Expanding School Choice, Pioneer Inst. (Aug. 4, 2021), https://pioneerinstitute.org/school_choice/the-institute-for-justices-michael-bindas-on-the-scotus-carson-v-makin-expanding-school-choice/; Walter Webert, Carson v. Makin: ACLJ Files Major Amicus Brief in Supreme Court School Choice Case, Am. Ctr. L. & J. (Sept. 13, 2021), https://aclj.org/school-choice/carson-v-makin-aclj-files-major-amicus-brief-in-supreme-court-school-choice-case.
54. Hunter Estes, Mississippi's 15-Week Abortion Ban Will Get Its Day in Court, Miss. Ctr. Pub. Policy (May 17, 2021), https://mspolicy.org/mississippis-15-week-abortion-ban-will-get-its-day-in-court/ ("[T]he Mississippi Center for Public Policy (MCPP) played a key role in drafting" Mississippi's 15-week abortion ban.); Mississippi Center for Public Policy, SourceWatch, https://mspolicy.org/mississippis-15-week-abortion-ban-will-get-its-day-in-court/; Andy Kroll, Exposed: The Dark-Money ATM of the Conservative Movement, Mother Jones (Feb. 5, 2013), https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/.
55 .Equal Justice, supra note 8, at 14.